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707 Wilshire Blvd.  
46<sup>th</sup> Floor  
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Tel: 213-620-1133  
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Referee

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

BAGDASARIAN PRODUCTIONS, LLC, a  
California limited liability company, and  
JANICE KARMAN, an individual,

Plaintiffs,

v.

TWENTIETH CENTURY FOX FILM  
CORPORATION, a Delaware corporation,

Defendant.

Case No.: CV102991MWF (JCGx)

Referred under Cal. Code Civ. Proc.  
Section 638 to:

Hon. Carl J. West (Ret.)

JAMS Reference No. 1220044628

**[PROPOSED] STATEMENT OF  
DECISION**

Pursuant to the parties' June 13, 2012 Joint Stipulation for an Order for the Appointment of a Referee Under California Code of Civil Procedure §638 and the June 14, 2012 Order by the Honorable Michael W. Fitzgerald of the United States District Court thereon, the Honorable Carl J. West (Ret.) (hereinafter the "Referee") was appointed to hear and decide disputes and conduct this reference proceeding between Plaintiffs Bagdasarian Productions, LLC ("BPL") and Janice Karman ("Karman") (collectively "Plaintiffs") on the one hand, and Defendant Twentieth Century Fox Film Corporation ("Fox") on the other. This Statement of Decision reflects the Referee's determinations, having heard and considered the parties' evidence and argument, and having previously considered various motions, applications and joint stipulations pertaining to the parties' disputes, and resolves all matters heard in this Reference proceeding. This Statement of Decision will be filed with the District Court for entry of judgment thereon.

## **PROCEDURAL BACKGROUND**

### **1. Plaintiffs' Complaint**

Plaintiffs filed their Complaint against Fox on April 21, 2010, asserting the following claims: (1) Karman's claim for declaration of co-ownership of copyright and accounting of profits (Count I); (2) Karman's claim for copyright infringement (Count II); (3) Plaintiffs' claim for unjust enrichment based on Karman's asserted screenwriting services on *Alvin and the Chipmunks: The Squeakquel* ("The Squeakquel") (Count III); (4) Plaintiffs' claims for unjust enrichment based on Karman's asserted graphic design services on *The Squeakquel* (Count IV); and (5) BPL's claim for alleged breach of contract and/or the covenant of good faith and fair dealing based on the "Purchase/Producer Agreement – Literary Material 'Alvin and the Chipmunks'" dated March 16, 2004 ("Agreement") (Count V) with respect to provisions involving (i) the "Purchase Price" and sequel compensation terms of paragraphs 6, 7 and 12 of the Agreement ("Purchase Price Claim"); (ii) "Picture-Related Merchandising" under paragraph 9 of the Agreement (the "Merchandising

Claim”); (iii) approval and consultation rights under paragraphs 15 and 16 of the Agreement (“Approval Rights Claim”); and (iv) access and invitation to meetings under paragraph 16 of the Agreement (“Access to Meetings Claim”).

## 2. Plaintiffs’ First Amended Complaint

On August 10, 2012, Plaintiffs filed their First Amended Complaint (“FAC”). In the FAC, Karman added claims for breach of implied contract directed to asserted writing services (“Writing Services Claim”) (Count V) and asserted graphic design services (“Graphic Design Services Claim”) (Count VI). BPL added claims to the breach of contract/implied covenant claim (newly renamed Count VII) asserting breaches involving (i) “Soundtrack Royalties” payable for the *Alvin and the Chipmunks* (“*Alvin*”) soundtrack album under paragraph 10 of the Agreement (“*Alvin* Soundtrack Claim”); (ii) pay television distribution (“*Alvin* HBO Distribution Claim”) under paragraphs 5 and 10 of the Agreement and (iii) cable television distribution (“FX Distribution Claim”) under paragraphs 5 and 10 of the Agreement.

## 3. Fox’s Motion to Dismiss Plaintiffs’ First Amended Complaint

On August 31, 2012, Fox filed its Motion to Dismiss Counts I through IV of the FAC and the Purchase Price and Merchandising Claims alleged in Count VII. In a November 14, 2012 Ruling on Fox’s Motion to Dismiss (“MTD Order”), the Referee granted Fox’s Motion to Dismiss as to Counts I through IV of the FAC and denied the motion as to the remaining claims. The MTD Order is attached as Exhibit 1 and incorporated herein by reference. Following dismissal of the federal claims, on December 3, 2012, the Referee issued an Order on Parties’ Proposed Further Orders on Motion to Dismiss and Order Setting Further Status Conference in which the Referee denied Plaintiffs’ proposed dismissal of the supplemental state law claims.<sup>1</sup>

<sup>1</sup> The December 3, 2012 Order, attached hereto as Exhibit 2 and incorporated herein by reference, confirmed that the MTD Order would stand as the ruling of the Referee on Fox’s Motion to Dismiss. December 3, 2012 Order at 2.

1           **4. Fox's Answer and Counterclaim for Declaratory Relief**

2           On November 30, 2012, Fox filed its Answer and Counterclaim for Declaratory  
3 Relief. Fox's Counterclaim asserted that Plaintiffs had pursued trademark  
4 applications for "Squeakuel" marks, secured various domain names that incorporate  
5 "Squeakuel" as part of the domain name, and that Plaintiffs claimed a right to  
6 continue pursuing such marks and domains, allegedly in violation of rights held by  
7 Fox under the Agreement. On January 30, 2013, the Referee entered an Order on the  
8 parties' Joint Stipulation and Proposed Order on Fox's Counterclaim ("Order  
9 Dismissing Counterclaim"), attached as Exhibit 3 and incorporated herein by  
10 reference, based on Plaintiffs' agreement to abandon pursuit of the disputed  
11 trademarks, to transfer various marks and domain names to Fox, and to not pursue  
12 specified Alvin-related trademarks in the future.

13           **5. Plaintiffs' Motion for Leave to File Second Amended Complaint**

14           On July 9, 2013, Plaintiffs filed a Motion for Leave to Amend the First  
15 Amended Complaint. The proposed Second Amended Complaint withdrew the  
16 Merchandising Claim, FX Distribution Claim, Approval Rights Claim and Access to  
17 Meetings Claim. The proposed Second Amended Complaint added new allegations  
18 regarding the *Alvin* Soundtrack Claim, relying on Section VII(BB)(1) of Exhibit A of  
19 the Standard Terms & Conditions of the Agreement ("Section VII"). Plaintiffs also  
20 added allegations to the *Alvin* HBO Distribution Claim, relying on paragraph 7 of the  
21 Agreement and Section VII, and asserted this same breach of contract/breach of  
22 implied covenant theory with respect to Fox's distribution of *The Squeakquel* ("*The*  
23 *Squeakquel* HBO Distribution Claim"). The proposed Second Amended Complaint  
24 also proposed claims for Soundtrack Royalties payable for *The Squeakquel* soundtrack  
25 album ("*Squeakquel* Soundtrack Claim"), referencing paragraph 10 of the Agreement  
26 and Section VII, and added proposed new claims for Rescission (Count VIII) and  
27 Unjust Enrichment (Count IX).

28           On September 9, 2013, the Referee granted in part and denied in part Plaintiffs'



1 Motion for Leave to Amend the First Amended Complaint (“September 2013 Order”),  
 2 attached as Exhibit 4 and incorporated herein by reference)<sup>2</sup>, permitting BPL to  
 3 proceed with the revised Soundtrack Claims for breach of contract (but not implied  
 4 covenant) and the proposed *Squeakquel* HBO Distribution Claim.<sup>3</sup> The September  
 5 2013 Order denied leave to add claims in all other respects.

6 On June 28, 2013, Fox moved for Partial Summary Judgment respecting the  
 7 Purchase Price Claim and FX Distribution Claim. The September 2013 Order denied  
 8 Fox’s motion directed to the Purchase Price Claim. With respect to the FX  
 9 Distribution Claim, because Plaintiffs indicated in their opposition that they were no  
 10 longer pursuing the claim, the Referee deferred a ruling on Fox’s motion pending  
 11 documentation of Plaintiffs’ withdrawal of the claim.

12 Consistent with the Referee’s September 2013 Order, Plaintiffs filed their  
 13 Second Amended Complaint (“SAC”) on September 23, 2013. The SAC withdrew  
 14 and thereby dismissed the Merchandising Claim, Approval Rights Claim, the FX  
 15 Distribution Claim, and the Access to Meetings Claim, and added the new or revised  
 16 Soundtrack Claims for breach of contract and HBO Distribution Claims.

17 **6. Parties’ Cross Motions for Summary Judgment or Partial Summary**  
 18 **Judgment**

19 On November 8, 2013, the parties filed cross-motions for summary judgment.  
 20 BPL filed a motion for partial summary judgment directed to the HBO Distribution  
 21 Claims and the Soundtrack Claims. Karman filed a motion for partial summary  
 22 judgment directed to the Writing Services Claim and the Graphic Design Services

23 <sup>2</sup> The September 2013 Order is captioned Order (1) Granting in Part and Denying in  
 24 Part Plaintiff Bagdasarian Productions Motion for Leave to Amend the First Amended  
 25 Complaint; and (2) Denying Defendant Twentieth Century Fox’s Motion for Partial  
 26 Summary Judgment.

27 <sup>3</sup> The “Soundtrack Claims” refers collectively to the *Alvin* and *The Squeakquel*  
 28 Soundtrack Claims and “HBO Distribution Claims” refers collectively to the *Alvin*  
 HBO Distribution Claim and *The Squeakquel* HBO Distribution Claim.

1 Claim. Fox filed a motion for summary judgment on each of these claims as well as  
 2 the Purchase Price Claim. On February 11, 2014 the Referee issued his order on the  
 3 parties' cross-motions ("Summary Judgment Order"), attached as Exhibit 5 and  
 4 incorporated herein by reference, denying Plaintiffs' motions, granting Fox's motion  
 5 on the Purchase Price Claim, the Soundtrack Claims, the HBO Distribution Claims  
 6 and Graphic Services Claim, and denying Fox's motion directed to the Writing  
 7 Services Claim. Fox's motion for summary judgment did not directly address that  
 8 portion of the *Alvin* Soundtrack Claim seeking recovery for a claimed underreporting  
 9 of units; that portion of BPL's *Alvin* Soundtrack Claim remained at issue following  
 10 the Summary Judgment Order.

#### 11 **7. Stipulation On Remaining Claims**

12 On April 8, 2014, the parties entered into a Stipulation to Undisputed Facts and  
 13 Request for Further Order on Cross-Motions for Summary Judgment relating to the  
 14 Writing Services Claim and the underreporting aspect of the *Alvin* Soundtrack Claim  
 15 by which they requested that the Referee enter a further order on the parties' cross-  
 16 motions for summary judgment (hereinafter "Stipulation on Remaining Claims"). On  
 17 April 14, 2014, based on the parties' Stipulation on Remaining Claims, the Referee  
 18 granted Fox summary judgment on the Writing Services Claim and on the  
 19 underreporting aspect of the *Alvin* Soundtrack Claim (hereinafter "Order Dismissing  
 20 Remaining Claims"). The Referee's Order Dismissing Remaining Claims is attached  
 21 as Exhibit 6 and incorporated herein by reference.

#### 22 **DISMISSAL OF CLAIMS**

23 For the reasons reflected in the Referee's prior rulings and Orders, including the  
 24 above-referenced MTD Order, Order Dismissing Counterclaim, September 2013  
 25 Order, Summary Judgment Order and Order Dismissing Remaining Claims, and based  
 26 on the evidence, argument and pleadings in this matter, and good cause appearing, the  
 27 Referee's Statement of Decision in this matter is as follows:

- 28 1. Karman's claims for declaration of co-ownership of copyright and

1 accounting of profits (Count I); (2) copyright infringement (Count II); (3) unjust  
2 enrichment (Count III) and unjust enrichment (Count IV) are dismissed with  
3 prejudice.

4 2. BPL's claims in Count VII consisting of the Purchase Price Claim,  
5 Soundtrack Claims and HBO Distribution Claims (together with any claims for breach  
6 of implied covenant related to these issues) are dismissed with prejudice.

7 3. BPL's abandoned Count VII claims consisting of the Merchandising  
8 Claim, FX Distribution Claim, Approval Rights Claim and Access to Meetings Claims  
9 are dismissed with prejudice.

10 4. Karman's Graphic Services Claim (Count VI) is dismissed with  
11 prejudice.

12 5. Fox's Counterclaim for Declaratory Relief is dismissed with prejudice,  
13 subject to the matters specified in the Referee's Order Dismissing Counterclaim.

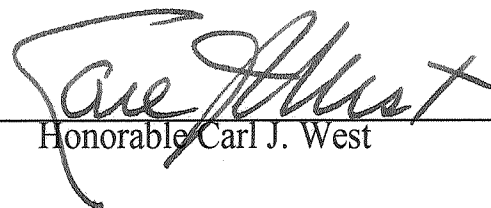
14 6. Karman's claim for Writing Services (Count V) and that portion of  
15 BPL's *Alvin* Soundtrack Claim directed to the alleged underreporting of units (Count  
16 VII) are dismissed with prejudice on the basis specified in the Order Dismissing  
17 Remaining Claims.

18 7. The Referee incorporates into this Statement of Decision all prior orders  
19 and rulings (including those made through postings on the JAMS message board  
20 system) involving scheduling, discovery and all other decisions by the Referee in  
21 connection with the above-referenced litigation.

22 8. This Statement of Decision resolves all matters heard in this Reference  
23 proceeding.

24  
25 IT IS SO ORDERED:

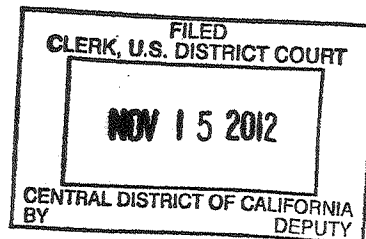
26  
27 DATED: 7-16-14

  
Honorable Carl J. West





## **EXHIBIT 1**



1 HON. CARL J. WEST, RET.  
2 JAMS  
3 707 Wilshire Blvd.  
4 46<sup>th</sup> Floor  
5 Los Angeles, CA 90017  
6 Tel: 213-620-1133  
7 Fax: 213-620-0100

8 Referee

9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA

11  
12 BAGDASARIAN PRODUCTIONS, LLC,  
13 and JANICE KARMAN,

14 Plaintiffs,

15 vs.

16 TWENTIETH CENTURY FOX FILE  
17 CORPORATION,

18 Defendants.  
19

) Case No. CV 10-02991 MWF (JCGx)

) JAMS Reference # 1220044628

) **RULING ON MOTION TO DISMISS**

20  
21 Defendant's Motion to Dismiss was filed on August 31, 2012. Plaintiffs' Opposition to the  
22 Motion to Dismiss was filed on September 26, 2012. Defendant's Reply to the Opposition was  
23 filed on October 5, 2012. A hearing on the Motion was held on October 31, 2012. The Referee  
24 has read and considered the parties' briefs and has considered the argument of counsel at the  
25 hearing. The Referee makes the following Order on the Motion.  
26

27 ///

28 ///

1 Motion is granted as to Counts I through IV. The express terms of the "Purchase/Producer  
2 Agreement-Literary Materials" dated March 26, 2004 are dispositive of the claims asserted in  
3 these Counts. The Agreement defines "Property" as follows:  
4

5  
6 "That certain pre-existing property generally known as "Alvin and  
7 the Chipmunks" a.k.a. "Chipmunks" a.k.a. "Chipmunks Go to the  
8 Movies," "Alvin and the Chipmunks Series," "The Alvin Show,"  
9 including various television series produced commencing in 1961,  
10 1983 through 1987, and 1988 through 1991, created and/or  
11 controlled by Ross-Bagdasarian, Sr., Ross Bagdasarian, Jr., Janice  
12 Karman, Bagdasarian Productions, LLC, *and any and all*  
13 *associated characters* (including Simon, Theodore, Alvin, and  
14 David Seville) *now or hereafter created and to the extent owned*  
15 *and/or controlled by Owner, and any and all other plots, themes,*  
16 *titles, story lines, names related thereto, and any and all other*  
17 *elements relating to any of the foregoing, now existing or created*  
18 *hereafter.* (Agreement, ¶1(a) (emphasis added).)  
19  
20  
21

22 When this language is considered in conjunction with the language contained in the Standard  
23 Terms and Conditions there is no question that the screenplay and graphic designs are literary  
24 material within the meaning of Property as defined in the Agreement. Plaintiffs have failed to  
25 explain how the screenplay and graphics produced by Ms. Karmen do not come within the  
26 language of ¶1(a) that embraces "...any and all other elements relating to any of the foregoing,  
27 now existing or created hereafter." The Standard Terms and Conditions include the following:  
28

1 “[t]he sole and exclusive right . . . to use all of the elements  
2 contained in the Property . . . to adapt, rearrange and make any  
3 changes in, deletions from or additions to the Property, to change  
4 the sequence thereof, to use a portion or portions of the Property . .  
5 . to change the characters in the Property, to change the  
6 descriptions of said characters, and to use all or any part of the  
7 foregoing in new versions, adaptations, other motion pictures,  
8 Remakes and Sequels (including Additional Motion Picture,  
9 Author Written Sequel Motion Pictures, Studio Sequel Motion  
10 Pictures and Remakes). . . .  
11  
12 (Agreement, ST&C, ¶6(b).)  
13  
14

15 The work performed by Ms. Karman constitutes “all or any part of the foregoing in new  
16 versions, adaptations, other motion pictures, Remakes and Sequels” and as such are subject to the  
17 Agreement. The screenplay for which Ms. Karman seeks compensation, while within the  
18 definition of Literary Material (STC §26(i)), is an element of the Property subject to the  
19 Agreement. Plaintiffs’ suggestion that the screenplay and graphic designs are outside the  
20 Agreement would defeat the purpose and intent of the Agreement. Literary Material as defined  
21 in the Standard Terms and Conditions is within the definition of Property to the extent it consists  
22 of “*and any and all other plots, themes, titles, story lines, names related thereto, and any and all*  
23 *other elements relating to any of the foregoing, now existing or created hereafter.*”  
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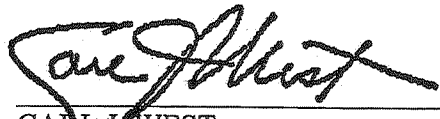
27 This is further confirmed by the fact that Ms. Karman’s co-ownership claim to *The Squeakquel*  
28 screenplay as alleged at §33 of the First Amended Complaint is inconsistent with in direct

1 contravention of the grant of rights contained in the parties' Agreement. STC §§ 6(f), 9, 15, and  
2 24.

3  
4 The motion is denied as to Counts V, VI, and VII. The implied contract and breach of contract  
5 claims cannot be adjudicated on a motion to dismiss as there are factual issues raised by the  
6 pleading. Notwithstanding the denial of the motion as to Count VII, it appears that Plaintiffs'  
7 claims for failure to merchandise and for additional compensation for the sequels (and the  
8 original film) will be precluded by the express terms of the Agreement. Specifically, the fact that  
9 merchandising was within the sole discretion of Fox will likely preclude any recovery on this  
10 claim. See *Third Story Music, Inc. v. Waits* 41 Cal.App.4<sup>th</sup> 798 (1996) and *Wolf v. Walt Disney*  
11 *Picture and Television*, 162 Cal.App.4<sup>th</sup> 1107, 1112 (2008). With respect to the claim for  
12 additional compensation for sequels, under the Agreement the terms of Paragraphs 6 and 7  
13 appear to preclude Plaintiffs' claims. The parties' course of dealing over several years, and in  
14 connection with the earlier sequel and original will provide an evidentiary basis for  
15 determination of this claim as well as the merchandising claim.  
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20 The parties are ordered to meet and confer regarding the form of an appropriate order  
21 implementing the Referee's ruling on Defendant's Motion to Dismiss. If the parties are in  
22 agreement as to the form of order, the order is to be submitted approved as to form by both  
23 counsel; in the absence of agreement, Defendant is directed to submit a proposed order. The  
24 agreed or proposed order is to be submitted on or before November 30, 2012.

25 Dated: November 14, 2012

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27   
28 CARL J. WEST  
Judge of the Superior Court (Ret.)  
Referee



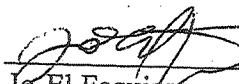
**PROOF OF SERVICE BY U.S. MAIL**

Re: Bagdasarian Productions LLC et al. vs. Twentieth Century Fox Film Corporation  
Reference No. 1220044628

I, Jo-El Fequiere, not a party to the within action, hereby declare that on November 14, 2012 I served the attached RULING ON MOTION TO DISMISS on the parties in the within action by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, Los Angeles, CALIFORNIA, addressed as follows:

Hon. Michael W. Fitzgerald  
U.S. District Court  
312 N. Spring St.  
#G-8  
Los Angeles, CA 90012-4793

I declare under penalty of perjury the foregoing to be true and correct. Executed at Los Angeles, CALIFORNIA, on November 14, 2012.

  
Jo-El Fequiere



## **EXHIBIT 2**

1 HON. CARL J. WEST, RET.  
2 JAMS  
3 707 Wilshire Blvd.  
4 46<sup>th</sup> Floor  
5 Los Angeles, CA 90017  
6 Tel: 213-620-1133  
7 Fax: 213-620-0100

8 Referee

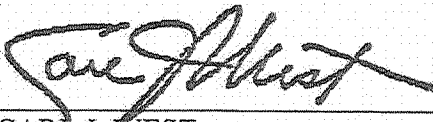
9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA  
11

12 BAGDASARIAN PRODUCTIONS, LLC,	)	Case No. CV 10-02991 MWF (JCGx)
13 and JANICE KARMAN,	)	
	)	JAMS Reference # 1220044628
14 Plaintiffs,	)	
	)	
15 vs.	)	<b>Order on Parties' Proposed Further Orders</b>
	)	<b>on Motion to Dismiss</b>
16 TWENTIETH CENTURY FOX FILE	)	
17 CORPORATION,	)	<b>Order Setting Further Status Conference</b>
	)	
18 Defendants.	)	
19	)	

20  
21 The Referee has read the Proposed Order on Motion to Dismiss submitted by Fox, Mr. Karasik's  
22 letter that accompanied the submission of the proposed order, and the Plaintiffs' Proposed Order  
23 and Objections to Fox's Proposed Order. The request in the Referee's Ruling on Motion to  
24 Dismiss for a proposed order implementing the Ruling was not intended as a request for Fox to  
25 rewrite the ruling, but rather a request for an order that would facilitate review of the ruling as  
26 discussed at the hearing. The Referee is not inclined to dismiss the supplemental state law  
27 claims as proposed by Plaintiffs. 28 U.S.C 1367(c) vests the District Court, and thus the Referee  
28

1 with discretion to retain jurisdiction over supplemental state law claims following dismissal of  
2 federal claims. The exercise of that discretion is founded on considerations of judicial economy,  
3 fairness, convenience, comity, and efficiency. The judicial reference in this case was made  
4 pursuant to the parties' agreement that disputes would be resolved through such a reference made  
5 pursuant to California Code of Civil Procedure §638. Dismissal of the state law claims, and the  
6 refiling of the claims in state court, as proposed by Plaintiffs, would frustrate the economies and  
7 efficiencies of the §638 reference procedure adopted by the parties for resolution of any disputes  
8 arising under the Purchase/Producer Agreement. The Referee will allow the Ruling on the  
9 Motion to Dismiss to stand and will forego any further order on the motion in the absence of a  
10 jointly proposed order intended by the parties to facilitate review of the Ruling. The parties  
11 should meet and confer for the purpose of addressing discovery and scheduling issues. A Further  
12 Status Conference will be held on January 11, 2013 at 9:00 a.m. at the JAMS Los Angeles office.  
13 The parties are to file a joint statement addressing discovery and scheduling issues on or before  
14 January 4, 2013.

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18 Dated: December 3, 2012

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CARL J. WEST  
Judge of the Superior Court (Ret.)  
Referee



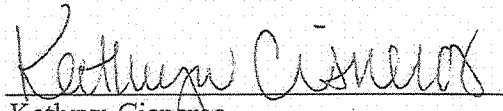
**PROOF OF SERVICE BY U.S. MAIL**

Re: Bagdasarian Productions LLC et al. vs. Twentieth Century Fox Film Corporation  
Reference No. 1220044628

I, Kathryn Cisneros, not a party to the within action, hereby declare that on December 04, 2012 I served the attached ORDER ON PARTIES' PROPOSED FURTHER ORDERS ON MOTION TO DISMISS AND ORDER SETTING FURTHER STATUS CONFERENCE in the within action by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, Los Angeles, CALIFORNIA, addressed as follows:

Hon. Michael Fitzgerald  
U.S. District Court  
312 N. Spring St., # G-8  
Los Angeles, CA 90012-4793

I declare under penalty of perjury the foregoing to be true and correct. Executed in Los Angeles, CALIFORNIA, on December 04, 2012.

  
Kathryn Cisneros



## **EXHIBIT 3**

1 Steven A. Marenberg (101033) (smarenberg@irell.com)  
2 Melissa R. McCormick (180384) (mmccormick@irell.com)  
3 Douglas J. Dixon (275389) (ddixon@irell.com)  
4 IRELL & MANELLA LLP  
5 1800 Avenue of the Stars, Suite 900  
6 Los Angeles, California 90067-4276  
7 Telephone: (310) 277-1010



6 Attorneys for Plaintiffs

7 Louis A. Karasik (100672) (lou.karasik@alston.com)  
8 Rachel M. Capoccia (187160) (rachel.capoccia@alston.com)  
9 Casondra K. Ruga (237597) (casondra.ruga@alston.com)  
10 ALSTON & BIRD LLP  
11 333 South Hope Street, 16th Floor  
12 Los Angeles, California 90071  
13 Telephone: (213) 576-1000

12 Attorneys for Defendant

14 UNITED STATES DISTRICT COURT  
15 CENTRAL DISTRICT OF CALIFORNIA  
16 WESTERN DIVISION

17 BAGDASARIAN PRODUCTIONS,	) Case No. CV-10-02991 MWF
18 LLC, a California limited liability	)
19 company, and JANICE KARMAN,	) Referred under Cal. Code Civ. Proc.
20 an individual,	) Section 638 to:
	)
21 Plaintiffs,	) Hon. Carl J. West (Ret.)
	)
22 v.	) JAMS Reference No. 1220044628
	)
23 TWENTIETH CENTURY FOX FILM	) <b>JOINT STIPULATION AND</b>
24 CORPORATION, a Delaware	) <b>PROPOSED ORDER ON FOX'S</b>
25 corporation,	) <b>COUNTERCLAIM</b>
	)
26 Defendant.	)

JOINT STIPULATION AND  
PROPOSED ORDER ON FOX'S  
COUNTERCLAIM

1 WHEREAS, Bagdasarian Productions, LLC ("Bagdasarian Productions")  
2 filed trademark applications bearing Serial Nos. 77648701, 77648706, 77648711,  
3 77648720, and 77648723 with the United States Patent and Trademark Office  
4 ("PTO") concerning the mark "Squeakuel" on January 13, 2009, and trademark  
5 Application No. 1,425,607 with the Canadian Intellectual Property Office  
6 concerning the mark "Squeakuel" on January 26, 2009 (collectively, "Trademark  
7 Applications");

8 WHEREAS, Bagdasarian Productions registered the domain names  
9 "squeakuel.com", "squeakuel.net", "squeakuel.org", "thesqueakuel.com",  
10 "thesqueakuel.net", and "thesqueakuel.org" on or about December 22, 2008  
11 ("Domain Names");

12 WHEREAS, Twentieth Century Fox Film Corporation ("Fox") filed a  
13 Counterclaim for Declaratory Relief in the above-captioned matter on November 30,  
14 2012 ("Counterclaim"), alleging, among other things, that Fox has the sole and  
15 exclusive right to register and use the mark "Squeakuel" (or any variation thereof)  
16 and to secure domain names that bear the name "Squeakuel" (or any variation  
17 thereof);

18 WHEREAS, Fox's Counterclaim seeks declaratory relief in the form, *inter*  
19 *alia*, of an order requiring Bagdasarian to cancel or abandon the Trademark  
20 Applications and to transfer or assign the Domain Names to Fox;

21 WHEREAS, Bagdasarian Productions withdrew trademark Application  
22 No. 1,425,607 in the Canadian Intellectual Property Office on December 6, 2012;

23 WHEREAS, Bagdasarian Productions abandoned the trademark applications  
24 with Serial Nos. 77648701, 77648706, 77648711, 77648720, and 77648723 in the  
25 PTO on December 5, 2012;

26 WHEREAS, Bagdasarian Productions has offered to transfer any interest it  
27 may have in the Domain Names to Fox;

28

JOINT STIPULATION AND  
PROPOSED ORDER ON FOX'S  
COUNTERCLAIM



1 WHEREAS, Bagdasarian Productions represents that it has not prosecuted  
2 and is not aware of any other trademark application pending in any jurisdiction  
3 worldwide concerning the mark "Squeakuel" (or any variant thereof) or the mark  
4 "Chipwrecked" (or any variant thereof) in which Bagdasarian Productions or any of  
5 its principals may have an interest; and

6 WHEREAS, Bagdasarian Productions represents that neither it nor its  
7 principals have registered any other domain names bearing the name "Squeakuel"  
8 (or any variant thereof) or "Chipwrecked" (or any variant thereof) in which  
9 Bagdasarian Productions or any of its principals may have an interest;

10 NOW THEREFORE THE PARTIES HEREBY STIPULATE AND AGREE:

11 1. Absent Fox's express written consent, Bagdasarian Productions shall  
12 not use or pursue any trademark or domain registrations in any jurisdiction  
13 worldwide based upon the title to the picture "Alvin and the Chipmunks: The  
14 Squeakuel" or any phonetic variant, including "Squeakuel", or the title of the  
15 picture "Chipwrecked" or any phonetic variant;

16 2. Bagdasarian Productions shall assign to Fox, for no additional  
17 consideration, any right, title or interest Bagdasarian Productions may have to the  
18 domain names "squeakuel.com", "squeakuel.net", "squeakuel.org",  
19 "thesqueakuel.com", "thesqueakuel.net", and "thesqueakuel.org";

20 3. Fox shall dismiss its counterclaim filed on November 30, 2012,  
21 without prejudice; and

22 //

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28 //

JOINT STIPULATION AND  
PROPOSED ORDER ON FOX'S  
COUNTERCLAIM

1 4. The proposed Order, if adopted by the Referee, shall in turn be  
2 submitted for entry by the Honorable Michael W. Fitzpatrick and shall take effect  
3 only upon entry by Judge Fitzpatrick. *FITZPATRICK* *MWF*

4 SO STIPULATED

5 Dated: January 28, 2013

Respectfully submitted,

6 IRELL & MANELLA LLP  
7 Steven A. Marenberg  
8 Melissa R. McCormick  
9 Douglas J. Dixon

10  
11 By: *[Signature]*  
12 Steven A. Marenberg

13 Attorneys for Plaintiffs

14  
15 Dated: January 29, 2013

Respectfully submitted,

16 ALSTON & BIRD LLP  
17 Louis A. Karasik  
18 Rachel M. Capoccia  
19 Casondra K. Ruga

20  
21 By: *Louis A. Karasik* *in dr*  
22 Louis A. Karasik

23 Attorneys for Defendant

24 SO ORDERED

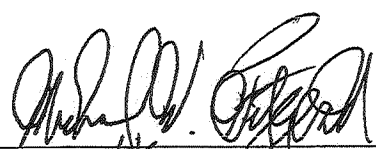
25 Dated: January 30, 2013

26 *[Signature]*  
27 Carl J. West  
28 Judge of the Superior Court (Ret.)  
Referee

JOINT STIPULATION AND  
PROPOSED ORDER ON FOX'S  
COUNTERCLAIM

1 SO ORDERED

2 Dated: Feb 13, 2013

  
Hon. Michael J. Fitzgerald  
United States District Court Judge  
Central District of California

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## **EXHIBIT 4**



1 HON. CARL J. WEST, RET.  
2 JAMS  
3 707 Wilshire Blvd.  
4 46<sup>th</sup> Floor  
5 Los Angeles, CA 90017  
6 Tel: 213-620-1133  
7 Fax: 213-620-0100

8 Referee

9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA  
11 WESTERN DIVISION

12 BAGDASARIAN PRODUCTIONS, LLC, a ) Case No. CV 10-02991 MWF (JCGx)
California limited liability company, and )
13 JANICE KARMA, an individual, ) JAMS Reference #1220044628
)
14 Plaintiffs, ) ORDER
)
15 v. ) (1) GRANTING IN PART AND DENYING
) IN PART PLAINTIFF BAGDASARIAN
16 ) PRODUCTION'S MOTION FOR LEAVE TO
) AMEND THE FIRST AMENDED
17 TWENTIETH CENTURY FOX FILM ) COMPLAINT
18 CORPORATION, a Delaware corporation, )
) (2) DENYING DEFENDANT TWENTIETH
19 Defendant. ) CENTURY FOX'S MOTION FOR PARTIAL
) SUMMARY JUDGMENT
20 )

21  
22 **PLAINTIFF BAGDASARIAN PRODUCTION'S MOTION FOR LEAVE TO AMEND**  
23 **THE FIRST AMENDED COMPLAINT**  
24

25 Introduction

26 Plaintiffs Bagdasarian Productions, LLC and Janice Karman brought an action against  
27 Defendant Twentieth Century Fox Film Corporation in the United States District Court for the  
28 Central District of California. On June 14, 2012, this action was referred under Cal. Code Civ.

1 Proc. §638 to the undersigned referee ("Referee"). Subsequently, Plaintiffs filed a First  
2 Amended Complaint for Declaration of Copyright of Co-Ownership of Copyright and  
3 Accounting for Profits, Copyright Infringement, Unjust Enrichment, Breach of Implied Contract,  
4 and Breach of Contract. Currently before this Referee is Plaintiff Bagdasarian Productions,  
5 LLC's Motion for Leave to Amend the First Amended Complaint.

6  
7 Background

8 The following facts are alleged in the First Amended Complaint ("FAC"):

9 Plaintiff Bagdasarian Productions, LLC ("Bagdasarian"), a company owned and run by  
10 Ross Bagdasarian, Jr. and his wife Janice Karman ("Karman"), is the owner and licensor of the  
11 properties known as Alvin and the Chipmunks. (FAC ¶2.) In 2004, Twentieth Century Fox  
12 Film Corporation ("Fox") and Bagdasarian entered into a Purchase/Producer Agreement  
13 ("Producer Agreement"), pursuant to which Bagdasarian granted Fox an option for the right to  
14 develop, produce and distribute motion pictures based on the underlying Alvin and the  
15 Chipmunks properties. (*Id.*) The first film produced under the Producer Agreement, Alvin and  
16 the Chipmunks ("Alvin I"), was released in 2007. (*Id.*)

17 Following the success of the first film, Fox and Bagdasarian began work on The  
18 Squeakquel, in early 2008. (*Id.* at ¶3.) In March 2008, Karman wrote the 33-page treatment for  
19 The Squeakquel screenplay. (*Id.*) In connection with the development of The Squeakquel  
20 screenplay, over the course of almost one year, Karman created numerous original treatments,  
21 draft screenplays, scenes and dialogue. (*Id.*) Karman's screenplay writings constitute a  
22 substantial portion of The Squeakquel's final screenplay. (*Id.*)

23 To date, Fox has refused to account to Karman as co-owner of The Squeakquel  
24 screenplay, or, in the alternative, as the owner of her substantial copyrighted contributions used  
25 by Fox, without authorization, in The Squeakquel screenplay. (*Id.* at ¶4.) Further, Fox has  
26 separately and repeatedly breached the Producer Agreement between Fox and Bagdasarian. (*Id.*)  
27 Consequently, Karman and Bagdasarian seek relief in this action. (*Id.*)

28 ///

The Claims Sought to be Added

In its Motion for Leave to Amend, Bagdasarian seeks leave to amend its FAC to add two contract-related claims for underpayment of compensation due to Bagdasarian from Fox on the soundtrack to the film Alvin and the Chipmunks: The Squeakquel ("The Squeakquel") and on the licensing of the picture to HBO, both in violation of the Producer Agreement between the parties, as well as a claim for rescission under California Civil Code § 1689(b). Bagdasarian contends that it has met the liberal standards under Federal Rule of Civil Procedure 15 because the claims sought to be added are either identical to or closely related to claims already in the case. It further contends that it is beneficial to litigate all claims now rather than in a separate proceeding.

Federal Rule of Civil Procedure 15(a) states in pertinent part that A[a] party may amend the party=s pleading once as a matter of course . . . . Otherwise a party may amend the party=s pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.@ Fed. R. Civ. P. 15(a). This policy is to be applied with Aextreme liberality.@ See DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987) (citing United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981)); see also Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990).

The United States Supreme Court stated that while it is in the court's discretion to grant or deny an opportunity to amend, a court's outright refusal to grant leave [to amend] without any justifying reason appearing for the denial is not an exercise of discretion . . . it is merely an abuse of that discretion. Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962). Reasons which may justify denial include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by previous amendments, prejudice to the opposing party, and futility of the amendment. See id.; see also DCD Programs, Ltd., 833 F.2d at 186. "Absent prejudice, or a strong showing of any of the remaining Foman factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d1048, 1052 (9<sup>th</sup> Cir. 2003).

Leave to Amend to Add the Contract Claim for Underpayment of  
Soundtrack Royalties on The Squeakquel Is Warranted

Bagdasarian seeks to add a claim for underpayment of royalties relating to The Squeakquel soundtrack. In the FAC, it already alleges that Fox has underpaid royalties relating to the soundtrack to Alvin I.<sup>1</sup> In the proposed Second Amended Complaint (“SAC”), Bagdasarian alleges that for sales of The Squeakquel soundtrack, as the basis for calculating royalties, Fox had calculated Bagdasarian’s royalty upon the wholesale price of the album of \$12.05 (called the “Purchase Price to Dealer” or “PPD”) rather than the SRLP. Bagdasarian contends that Fox also reduced the royalty payable to it by 25% when computing the royalty due Bagdasarian on album sales in Canada.

In its Opposition, Fox asserts that The Squeakquel soundtrack claim is futile because Bagdasarian agreed that such claims could only be brought against Rhino records. Relying on the Producer Agreement, Fox states that where Fox obtains a written agreement with the record company to pay and account for soundtrack royalties directly to Bagdasarian, “Fox shall be relieved” of those obligations and Bagdasarian “shall look solely to the Record Company for such royalties.” (Agreement, ¶10(e)). Fox states that it entered into such agreement with Rhino in August 2009, and only Rhino pays and accounts to Bagdasarian for its royalties.

In response, Bagdasarian points to the entire language of Paragraph 10(e) of the Producer Agreement, which provides:

Fox agrees to use its reasonable efforts to cause the Record Company to account for and pay the Soundtrack Royalty directly to Owner hereunder (unless such Record Company does not ordinarily render direct third party accountings), and if Record Company agrees in writing to Owner to so account, Fox shall be relieved of such obligations and Owner shall look solely to Record Company for such record royalties.

(Producer Agreement, ¶10(e).) According to Bagdasarian, Rhino did not agree “to account for and pay the Soundtrack Royalty directly” to it. As a result, Fox is not “relieved” of its obligations to account to Bagdasarian for the payment of royalties.

---

<sup>1</sup> Specifically, Bagdasarian alleges that Fox underpaid royalties on the sales of the Alvin I soundtrack by basing the royalty upon an amount other than the full SRLP (suggested retail list price).

1        Given the parties' contentions, the Referee finds that alleging this claim is not futile.  
2        Under Rule 15, a claim is futile if no set of facts can be proved under the amendment to the  
3        pleadings that would constitute a valid and sufficient claim. Miller v. Rykoff-Sexton, Inc., 845  
4        F.2d 209, 214 (9<sup>th</sup> Cir. 1998). In the proposed SAC, Bagdasarian contends:  
5                Fox deprived Bagdasarian Productions of substantial royalties on  
6                sales of The Squeakquel soundtrack by calculating Bagdasarian  
7                Productions' royalty based upon the wholesale price of the album  
8                (called, in record industry parlance, the "Purchase Price to Dealer"  
9                or "PPD") rather than the full SRLP. Moreover, Fox also reduced  
              the royalty by 25% when computing the royalty due Bagdasarian  
              Productions on album sales of The Squeakquel soundtrack in  
              Canada. Neither is permitted by the Producer Agreement.

10        (Proposed SAC ¶43.) In arguing that this claim is futile, Fox goes beyond what is plead, relying  
11        on an agreement it claims was entered with Rhino, and further, Bagdasarian alleges that in this  
12        agreement, Fox permitted Rhino to account to Bagdasarian for royalty amounts less than the  
13        Soundtrack Royalty – one that is calculated based upon the wholesale price of The Squeakquel  
14        album rather than the SRLP. Thus, leave to amend is warranted.

15        Fox asserts that even if the soundtrack claim is not futile, the delay in asserting them  
16        requires that leave to amend be denied. It contends that Bagdasarian was aware in May 2009  
17        that Fox was negotiating an agreement with Rhino under which Bagdasarian's royalties were  
18        subject to percentage rate deductions for various territories and that PPD accounting was  
19        applicable, yet Bagdasarian did not sue for the claimed breach in the original complaint (April  
20        2010) or the FAC (August 2012) and now raises the issue for the first time over four years later  
21        without reasonable excuse. Fox argues that this delay plainly prejudices it because it will be  
22        required to obtain evidence in the custody and control of Rhino records.

23        The Referee finds no undue delay or prejudice to Fox. Bagdasarian states that it only  
24        recently learned of the facts underlying The Squeakquel royalties claim following Fox's  
25        production of documents relating to the calculation and payment of those royalties. Specifically,  
26        it states that on December 27, 2012, it served a Second Set of RFPs which sought Fox's  
27        soundtrack agreements with the record distributors for The Squeakquel and Chipwrecked  
28        soundtracks as well as other documents related to Fox's calculation and payment of soundtrack  
              royalties on sales of those soundtracks. Bagdasarian states that while Fox produced its



1 agreements with the record distributors, it failed to produce other documents relating to its  
2 calculation and payment of royalties until Bagdasarian complained on April 26, 2013.  
3 Subsequently, Bagdasarian sought a stipulation from Fox to allow it to file a second amended  
4 complaint containing a claim for the underpayment of royalties on sales of The Squeakquel  
5 soundtrack. Furthermore, “[u]ndue delay by itself . . . is insufficient to justify denying a motion  
6 to amend.” Bowles v. Reade, 198 F.3d 752, 757-58 (9<sup>th</sup> Cir. 1999). Fox would still need to  
7 show undue prejudice, and its bare claim that it would need to seek discovery from Rhino  
8 records is insufficient. As Bagdasarian points out, Fox can seek such evidence over the next two  
9 and a half months before fact discovery closes on October 18, 2013. In addition, as stated above,  
10 a similar claim relating to the royalties for the Alvin I soundtrack already exists in this case.<sup>2</sup>  
11 Thus, Bagdasarian is granted leave to amend to add a contract claim based on the royalties on the  
12 sales for The Squeakquel soundtrack.

13  
14 Leave to Amend to Add Claim for Breach of Implied Covenant of  
15 Good Faith and Fair Dealing Is Not Warranted

16 In Count VII (Breach of Contract) of the proposed SAC, Bagdasarian contends that the  
17 underpayment of soundtrack royalties also constitutes a breach of the implied covenant of good  
18 faith and fair dealing. (SAC at ¶75.) In its current Motion, Bagdasarian argues that if Fox is  
19 correct that it is permitted to reduce all soundtrack royalties to Bagdasarian in accordance with  
20 the provisions of the distribution agreements with the soundtracks’ distributors, then Fox, when  
21 negotiating and then later using these third-party agreements as a basis to reduce Bagdasarian’s  
22 royalties, breached either Section VII (BB)(1) of Exhibit A of the Standard Terms and  
23 Conditions to the Agreement, which prohibits Fox from exercising its business judgment on a  
24 discriminatory basis, or the implied covenant of good faith and fair dealing, which prohibits Fox  
25 from engaging in conduct that frustrates Bagdasarian’s rights of the benefits of the contract, or

26  
27 <sup>2</sup> The Referee notes that in its Opposition to this Motion, Fox argues that the Alvin I soundtrack claims  
28 are time barred. However, such argument on this claim, which was first plead in the FAC, is not properly  
brought before the Referee on this Motion for Leave to Amend.

1 both. Fox asserts that Bagdasarian's proposed implied covenant soundtrack claims are futile  
2 because they cannot, as a matter of law, be based on the same facts as a breach of contract claim.

3 Fox is correct that an implied covenant cannot be read into a contract that has express  
4 terms governing the parties' conduct. "[T]he implied covenant will only be recognized to further  
5 the contract's purpose; it will not be read into the contract to prohibit a party from doing that  
6 which is expressly permitted by the agreement itself." Wolf v. Walt Disney Picture and  
7 Television, 162 Cal. App. 4<sup>th</sup> 1107, 1120 (2008). Accordingly, leave to amend to assert this  
8 claim is not warranted.

9  
10 Leave to Amend to Add Breach of Contract Claim For Discrimination  
11 in Licensing The Squeakquel to HBO Is Warranted

12 Bagdasarian alleges that through discovery, it has learned that Fox allowed The  
13 Squeakquel to be licensed to HBO under the HBO output arrangement of its co-financing  
14 partner, Regency, for less money than Fox and Bagdasarian would have received had the film  
15 been licensed to HBO under Fox's own HBO output arrangement.<sup>3</sup> (SAC ¶ 40.) It alleges that  
16 Fox accepted less money for the lucrative HBO license in exchange for benefits from Regency to  
17 Fox that were not shared with Bagdasarian in violation of the Agreement's requirement that Fox  
18 exercise its business judgment in a "reasonable and non-discriminatory manner." (Id.)

19 In its Opposition, Fox argues that this proposed claim is futile. Specifically, Fox argues  
20 that "non-discriminatory" means disparate treatment of similarly situated persons, and here, the  
21 assertion that Fox was "discriminatory" is particularly impossible because all profit participants  
22 for The Squeakquel had diminished revenue from HBO as a result of the co-financing of the  
23 pictures with New Regency, and so did Fox.<sup>4</sup>

24  
25  
26 <sup>3</sup> Bagdasarian asserted a claim in the FAC alleging that Fox breached the Producer Agreement by  
27 allowing Alvin I to be licensed to HBO under the terms of the HBO output arrangement of its co-  
financing partner, Regency, for less money than Fox and Bagdasarian would have received had the film  
been licensed to HBO under Fox's own HBO output arrangement.

28 <sup>4</sup> Fox also asserts this argument with respect to the claim based on Alvin I as alleged in the FAC, but this  
claim is not at issue here in this Motion for Leave to Amend.



1 The Referee finds that Bagdasarian's contract claim based on the licensing to HBO does  
2 not fail to state a claim, and as such, is not futile. Rather, based on Fox's arguments, resolution  
3 of this claim will depend on the interpretation and application of the Agreement's language that  
4 "Fox exercise its business judgment in a 'reasonable and non-discriminatory manner.'" Thus,  
5 the Referee finds that leave to amend to add this claim is warranted.

6  
7 Leave to Amend to Add a Claim for Rescission Is Not Warranted

8 Bagdasarian contends that discovery conducted to date suggests that the parties may not  
9 have had a meeting of the minds on the conditions under which Fox had the right to produce  
10 sequels. Specifically, according to Bagdasarian, discovery shows:

- 11 • Bagdasarian always sought more money for sequels than it would receive for the first  
12 picture and Fox always wanted to pay less or, at most, the same amount it paid for the  
13 first picture than for sequels;
- 14 • The parties' course of performance and course of dealing with one another indicates that  
15 for each of the two sequels, Fox took the position that the \$3million payment was  
16 recoupable against contingent compensation, and on each occasion, Bagdasarian objected  
17 to Fox's accounting treatment;
- 18 • Fox contends that it never agreed, nor would it have agreed, to pay Bagdasarian more  
19 money for sequels than Fox paid for the first picture; and
- 20 • Bagdasarian did not agree, nor would it have agreed, to execute any deal that did not  
21 provide more for sequels than for the first picture and understood the pertinent provisions  
22 to require Fox to pay \$3 million and 2.5% of Gross Proceeds for sequels.

23 As such, Bagdasarian asserts that if its interpretation of the Producer Agreement is not  
24 accepted by the trier of fact, then there was a mutual mistake as to the conditions under which  
25 Fox could produce sequels to Alvin I under the Producer Agreement, rendering the Producer  
26 Agreement rescindable due to mutual mistake, and it seeks to add this cause of action as an  
27 alternative theory of recovery to the breach of contract claim.

28 In its Opposition, Fox argues, among other things, that Bagdasarian's purported unilateral  
misinterpretation of contract terms is not a basis for rescission. It relies on Hedging Concepts.

1 Inc. v. First Alliance Mortgage Co., 41 Cal. App. 4<sup>th</sup> 1410 (1996). The Referee agrees that  
2 Hedging Concepts is instructive here. In Hedging Concepts, the appellate court reversed the trial  
3 court's rescission of a contract. Id. at 1422. It found that the parties' differing subjective  
4 understandings of the contract does not constitute a "mistake" for rescission purposes. Id. at  
5 1421. It stated:

6       There are two reasons courts will not set aside contracts for mere  
7 subjective misinterpretation. First, to declare rescission based  
8 upon mistaken undisclosed subjective interpretation would conflict  
9 with the objective theory of enforceable contracts. If this were the  
10 law, the objective theory of contracts would give with one hand,  
11 while the subjective misunderstanding theory of rescission would  
12 take away with the other. This is not the law. Second, a unilateral  
misinterpretation of contractual terms, without knowledge by the  
other party at the time of contract, does not constitute a mistake  
under either Civil Code section 1577 or 1578. See, generally, 1  
Witkin, Summary of California Law (9<sup>th</sup> ed. 1987) Contracts,  
section 379, pages 345-346.

13 Id. at 1422.

14       Bagdasarian claims that since the Referee has already held that the disputed provisions  
15 are susceptible to multiple interpretations, Fox's unilateral misunderstanding arguments fails. It  
16 argues that a mutual mistake forms the basis of its rescission claim, not its "unilateral  
17 misinterpretation." This is the same situation addressed by the court in Hedging Concepts:  
18 when the parties have differing subjective understandings of the contract. As found by that  
19 court, this does not constitute a "mistake" for purposes of Civil Code §1689. Id. at 1421, 22.  
20 Bagdasarian also attempts to distinguish Hedging Concepts by stating that the contract involved  
21 there was an unambiguous contract. However, because the Hedging Concepts court makes no  
22 mention regarding the ambiguity of the contract at issue, such a distinction does not appear  
23 pertinent to its findings.

24       As aptly stated by the Hedging Concepts court: "Clearly, each side here placed a  
25 different interpretation on the contract, hence all parties did not make the same mistake." Id. at  
26 1421. Indeed, in the proposed SAC, Bagdasarian alleges "[d]ue to this mutual misunderstanding  
27 of Paragraph 12 of the Producer Agreement, the Producer Agreement should be rescinded . . ."  
28 (SAC ¶85.) Any alleged "misunderstanding" by the parties does not equate to a mistake as that

1 legal term is used. The Referee finds that such a claim for rescission cannot be properly plead  
2 and therefore is futile. Leave to amend to add this claim is not warranted.<sup>5</sup>

3  
4 Leave to Amend to Add Claim for Unjust Enrichment Is Not Warranted

5 In the proposed SAC, Bagdasarian seeks to add a claim for unjust enrichment based on its  
6 new contract claims. Fox contends that the proposed unjust enrichment claim is futile, like the  
7 two prior unjust enrichment claims dismissed by the Referee, because the Producer Agreement  
8 governs the parties' rights and obligations. According to Bagdasarian, it seeks unjust enrichment  
9 along with rescission as an alternative to its damages claims, and in the event the Agreement is  
10 rescinded, Bagdasarian alleges that Fox has been unjustly enriched. However, as explained  
11 above, the rescission claim is futile, and leave to add that claim is not granted. Therefore, the  
12 Referee finds that the unjust enrichment claim is also futile, and leave to amend to add this claim  
13 is not warranted.

14  
15 Conclusion

16 Based on the foregoing, the Referee grants in part and denies in part Plaintiff Bagdasarian  
17 Productions, LLC's Motion for Leave to Amend the First Amended Complaint as follows:

- 18 • **Grants** with respect to the breach of contract claim based on soundtrack royalties for The  
19 Squeakquel;  
20 • **Denies** with respect to the implied covenant of good faith and fair dealing contained in  
21 the breach of contract claim;  
22 • **Grants** with respect to the breach of contract claim based on the licensing to HBO;  
23 • **Denies** with respect to the rescission claim; and  
24 • **Denies** with respect to the unjust enrichment claim.

25 Plaintiffs shall file and serve the Second Amended Complaint consistent with this Order  
26 no later than September 23, 2013.

27  
28 

---

<sup>5</sup> The Referee notes that Fox raises additional arguments regarding the futility of the proposed rescission claim, but it is not necessary to address these further arguments in light of the finding herein.

1 In addition, the Referee notes that in Footnote 1 of their Motion for Leave to Amend,  
2 Plaintiffs propose to drop certain claims in the FAC "in an effort to streamline this case." The  
3 Referee shall treat this as a request by Plaintiff pursuant to Fed. R. Civ. Proc. 41 and grants  
4 Plaintiffs' request to dismiss the claims set forth in Footnote 1.

5  
6 **DEFENDANT TWENTIETH CENTURY FOX'S MOTION FOR PARTIAL**  
7 **SUMMARY JUDGMENT/SUMMARY ADJUDICATION**  
8

9 Pursuant to Rule 56 of the *Federal Rules of Civil Procedure*, Fox seeks an order granting  
10 partial summary judgment and/or summary adjudication on BPL's "Purchase Price" Claim in  
11 Count VII of Plaintiffs' First Amended Complaint.<sup>6</sup>

12 To prevail on a motion for summary judgment or partial summary judgment, a moving  
13 party must: (a) meet its *burden of production* by either producing evidence negating an essential  
14 element of the non-moving party's claim or showing that the non-moving party does not have  
15 sufficient evidence to succeed at trial; (b) meet its *burden of persuasion* by convincing the court  
16 that there is no genuine issue of material fact; and (c) demonstrate that it is thus entitled to  
17 judgment as a matter of law. In considering whether summary judgment is appropriate, the  
18 Referee must view the evidence "in the light most favorable" to the non-moving party.<sup>7</sup>  
19 A moving party may not require a non-moving party to produce evidence supporting its claim or  
20 defense simply by saying that the non-moving party has no such evidence.<sup>8</sup> Even if the moving  
21

22 <sup>6</sup> Fox moved for partial summary judgment on BPL's "Purchase Price" and "FX" Claims in Count VII of  
23 Plaintiffs' First Amended Complaint. This Order addresses the "Purchase Price" only, as BPL is "no  
24 longer pursuing" the "FX" claim. *See* footnote 1 at page 1, Plaintiffs Bagdasarian Productions, LLC and  
25 Janice Karman's Memorandum of Law in Opposition to Defendant's Motion for Partial Summary  
26 Judgment dated July 30, 2013 (Opposition Brief).

26 <sup>7</sup>*Nissan Fire & Marine Ins. Co. v. Fritz Companies*, 210 F.3d 1099, 1102 (9<sup>th</sup> Cir. 2000); *Thorns v.*  
27 *Sundance Properties*, 726 F.2d 1417, 1418 (9<sup>th</sup> Cir. 1984).

28 <sup>8</sup>*Nissan Fire & Marine Ins. Co. v. Fritz Companies*, at 1105.

1 party can meet the *burden of production*, to prevail on summary judgment, it must also meet the  
2 *burden of persuasion*—by persuading the court that there is no genuine issue of material fact.<sup>9</sup>  
3 Further, where two parties specifically declare contradictory material facts, there is a genuine  
4 issue for trial and summary judgment must be denied.<sup>10</sup>

#### 5 6 Evidentiary Objections

7 Fox has lodged objections to the evidence offered by Bagdasarian and Karmen. The  
8 Referee makes the following rulings on the evidentiary objections:

- 9
- 10 1. Fox Objections to Declaration of Ross Bagdasarian, Jr.-Overruled, except to the  
11 extent it offers hearsay statements attributable to Steve Waterman.
  - 12 2. Fox Objections to the Declaration of Frederick I. Bernstein-Overruled. The Plum  
13 declaration places at issue factual matters relating to custom and practice in the  
14 industry, i.e., the “Marvel” sequel contract, as well as the issue of the  
15 interpretation of the word “advance” as a term of art or a term with an accepted  
16 meaning in the industry.

#### 17 18 Ruling on Motion

19 Motion is denied. The “Purchase Price” claim is not subject to summary adjudication  
20 because there are questions of fact relating to the interpretation of the parties Agreement. Where  
21 the parties proffer conflicting interpretations of an agreement, both of which may be found to be  
22 reasonable, the court may entertain extrinsic evidence to assist in both interpreting the agreement  
23 and in determining the intent of the parties. As to the “FX” Claim, the Referee will defer a

24  
25 \_\_\_\_\_  
26 <sup>9</sup>*Nissan Fire & Marine Ins. Co. v. Fritz Companies*, at 1106.

27 <sup>10</sup>*Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990) “[W]here the facts specifically averred  
28 by [the non-moving] party contradict facts specifically averred by the movant, the motion must be  
denied.”